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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-332

RICHARD R. SATTERWHITE, JR., for himself and on behalf of all other persons similarly situated,
Petitioner

v.

UNITED PARCEL SERVICE, INC.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RICHARD R. SATTERWHITE, JR., for himself and on behalf of all other persons similarly situated,

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v.

UNITED PARCEL SERVICE, INC.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The petitioner, Richard R. Satterwhite, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case on May 3, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) [1] is reported at 496 F.2d 448, and unofficially reported at

[1] "App." refers to the appendix to this petition; "R" refers to the Joint Appendix filed in the court of appeals.

74 CCH Lab. Cas. ¶ 33,068 and 21 Wage & Hour Cas. 747. The opinion of the District Court for the District of Colorado (App. 9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1974. A timely application for an extension of time in which to file a petition for writ of certiorari was granted, extending the time to September 23, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether invocation of the grievance arbitration procedures of a collective bargaining agreement, which resulted in an award of straight time pay for overtime hours, precludes the affected employees from maintaining an action under Section 16(b) of the Fair Labor Standards Act to recover the additional one-half time compensation due to them under the Act, together with an equal amount as liquidated damages, a reasonable attorney's fee, and costs?

STATUTES INVOLVED

Sections 7(a)(1) and 16(b) of the Fair Labor Standards Act, 52 Stat. 1060, *et seq.*, as amended, 29 U.S.C. 207(a)(1) and 216(b), provide as follows:

> Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above

specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

SEC. 16.(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained [against any employer (including a public agency)] in any [Federal or State] court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.[2]

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[2] The bracketed words were added to Section 16(b) by the Fair Labor Standards Amendments of 1974, Section 6(d)(1), Pub.L. No. 93-259.

STATEMENT

This action was brought under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, on behalf of the plaintiff and other employees similarly situated, to recover unpaid overtime compensation required by Section 7(a)(1) of that Act and for an equal amount as liquidated damages, plus attorney's fees and costs. Fifty-eight employees joined as parties plaintiff. On an agreed factual record (R. 107), the district court entered judgment for defendant on the ground that plaintiff's suit was precluded by a previous arbitration decision made under the provisions of a collective bargaining agreement (R. 108-111). The court of appeals affirmed (App. 8a).

Respondent operates a parcel delivery service. Until December 29, 1970, respondent's employees began their workday at 8 a.m. and ended it at 4:30 p.m. This interval of 8½ hours included one hour per day of inactive time, an unpaid lunch period of 30 minutes and two 15-minute rest periods (one in the morning and the other in the afternoon) (R. 35).

On December 29, 1970, respondent unilaterally increased its employees' scheduled workday from 8½ hours to 9 hours (8 a.m. to 5 p.m.). No additional inactive time was provided for by this change. Accordingly, the employees' workweek and actual working time was increased by 2½ hours per week, while their pay remained unchanged (R. 35, 50). Employees other than truck drivers were instructed that they would be required to use their one hour per day as an unpaid "lunch period."[3] Truck drivers were re-

[3] In practice, the employees other than truck drivers could take their one hour of inactive time as "part lunch and part 'breaks'" (Brief of respondent as appellee below, at p. 2).

quired to take their hour "in one or more segments, at the employee's discretion, if circumstances permit" (R. 35). The expressed purpose of this change was "to increase production * * * and reduce our losses" (R. 50).

The complaint in this case alleges that, under the Fair Labor Standards Act, petitioners are entitled to receive compensation for 42½ hours per week and that, by virtue of Section 7(a)(1) of that Act, 2½ hours of that time must be paid at premium rates. This allegation is based upon petitioner's contention that the employer's pay obligations under the Act extend to inactive periods required by him, predominantly for his own benefit, in his scheduling of the day's work [4] and, in the case of the truck drivers, to fortuitous short intervals of slack time when they must remain immediately available for resumption of work, but may otherwise make personal use of the time, if and to the extent that "circumstances permit." [5] The district court did not decide this legal issue because it concluded that petitioners' suit was precluded by the prior decision of an arbitrator made under the terms of a collective bargaining agreement between respondent and petitioners' union (R. 109-111). The court of appeals observed with regard to this issue that "FLSA § 7(a)(1) provides for pay at 1 and ½ times the straight rate * * *. This differs from the arbitration award * * *" (App. 3a).

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[4] See *Goldberg* v. *Aeromotive Metal Products, Inc.*, 312 F.2d 728 (C.A. 9); *Mitchell* v. *Turner*, 286 F.2d 104 (C.A. 5); *Mitchell* v. *Greinitz*, 235 F.2d 621 (C.A. 10); 29 C.F.R. §§ 785.18, 785.19.

[5] See *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Willmark Service System, Inc.* v. *Wirtz*, 317 F.2d 486 (C.A. 8); *Wirtz* v. *Sullivan Lumber Co.*, 326 F.2d 946 (C.A. 5); 29 C.F.R. §§ 785.16(b), 785.17.

The arbitration award in question resolved grievances which had been filed by respondent's employees as a result of the unilateral change in its employees' work schedule. The grievances were submitted to arbitration under a provision of the collective bargaining agreement providing for the arbitration of disputes "involving the interpretation, construction, intent, or meaning of this Agreement" (Art. 16, R. 47-48). The arbitration submission referred the arbitrator to specific articles of the collective bargaining agreement including, in particular, Article 5 which required pay at "time and one-half" for hours over 40 in the week or over 8 in the day "exclusive of lunch periods"(R.46). The arbitrator was asked to decide, *inter alia*, whether the union had acquiesced in the change of schedule, and if not whether respondent had "the right to take such action" (R. 45-46).

The arbitrator ruled that the Union had not acquiesced in the change (R. 45). He ruled further that the paid rest periods were "for the obvious advantage to the Company" and were "in effect, part of the Union contract," and that they could not be withdrawn without the Union's consent (R. 65). He accordingly concluded that the employees were entitled to be paid for 42½ hours per week, from December 25, 1971, the day the employer changed the work schedule, to September 15, 1971, the day the Union contract expired (R. 68).

In a supplementary decision, the arbitrator ruled that the additional half-hour per day for which wages were due should be paid at regular rates and not at overtime rates, even though they were for hours in excess of 40 in the week (R. 76). The express ground was that to require overtime rates "would exact a

penalty from the Company," which would not be warranted since the Company had acted in good faith "according to its interpretation of the labor agreement" (R. 77). The arbitrator also denied interest on the wage deficiencies because, among other reasons, there was no "language in the Labor Agreement" authorizing the payment of such interest (R. 78).[6] Nowhere in the arbitrator's decisions is any reference made to the Fair Labor Standards Act or to the case law thereunder (R. 45-81).

The instant suit is not based on the Union contract but on the requirement of Section 7(a) of the Fair Labor Standards Act, that for all hours worked in excess of 40 in the week, the rate of compensation must be one and one-half times the employee's regular rate of pay (Cplt., R. 22-23). The district court, however, relying on the Tenth Circuit's opinion in *Alexander* v. *Gardner-Denver Co.*, 466 F.2d 1209, *reversed*, 415 U.S. 36, held that the arbitrator's decision, although limited to the terms of the contract, was nonetheless determina-

[6] The other reasons were that the obligation of the Company was not liquidated; that the evidence did not show that the Company "acted deliberately to injure the grievants"; and that interest would, in any event, only be awarded for the period between the date the formal demand for interest was made and the date the award is satisfied. Section 11 of the Portal-to-Portal Act (29 U.S.C. 260) requires a court in a Section 16(b) suit to award liquidated damages in an amount equal to the unpaid wages due except that "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act," the court has discretion to grant less than the full amount of liquidated damages. The award must, however, at least equal the amount of interest due. See, e.g., *Wright* v. *Carrigg*, 275 F.2d 448, 449 (C.A. 4); *McClanahan* v. *Mathews*, 440 F.2d 320, 322 (C.A. 6).

tive of the obligations imposed by the Act (R. 110-111). Accordingly, it entered judgment for the defendant without passing on the merits of the legal issues raised by the complaint (App. 13a).

Despite this Court's reversal of *Gardner-Denver*, the court of appeals affirmed (App. 8a). It held that when a wage dispute is submitted to arbitration under a collective bargaining agreement, the employees may not thereafter maintain a suit under Section 16(b) of the Fair Labor Standards Act "on the basis of the same factual occurrence as that presented to the arbitrator" (App. 8a). With respect to the overtime premiums due for the time held by the arbitrator to be compensable, the court of appeals said, "It is reasonable to infer that the arbitrator compromised by giving the employees all the time which they sought while deciding the rate of pay in favor of the company" (App. 3a). The Fair Labor Standards Act contains no provision for discretionary remission of overtime premiums due under Section 7(a)(1).

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with this Court's holding in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, that resort to the arbitration grievance procedure does not bar an employee from pursuing in court a statutory claim under Title VII of the Civil Rights Act. It also conflicts with the rulings by this and other courts that rights under the Fair Labor Standards Act cannot be diminished by collective bargaining agreements or by private agreements between employers and employees (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697; *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (C.A. 5), certiorari denied, 409

U.S. 948), and that the courts cannot relieve an employer of his statutory obligations under the Act, unless he "proves that the act or omission * * * was [committed] in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of * * * the Administrator of the Wage and Hour Division of the Department of Labor" (Portal-to-Portal Act of 1947, 29 U.S.C. 259; see *Hodgson* v. *Square D Co.*, 459 F.2d 805 (C.A. 6), certiorari denied 409 U.S. 967; *King* v. *Board of Education of Chicago*, 435 F.2d 295 (C.A. 7), certiorari denied, 402 U.S. 908).

The decision below, if left unreviewed, will not only have far reaching effects upon the thousands of organized employees in this country, but it will also unsettle a large and important area of law which had previously been regarded as settled.

1. The conflict between the decision below and this Court's opinion in *Gardner-Denver* is no less direct because suit here involved rights under the Fair Labor Standards Act and not under Title VII of the Civil Rights Act.[7] In nonetheless attempting to make this distinction, the court below relied on the untenable ground that wage and hour disputes under the Fair Labor Standards Act present no issue which requires public policy considerations. Clearly, however, the Fair Labor Standards Act is concerned with more than simply adjustment of the working relationship of particular employees and their employer. It has a public purpose which, in the case of Section 7

[7] Indeed, the considerations which this Court found determinative in *Gardner-Denver* are in some respects even more compelling in this case where the only issue is one of statutory construction based upon contested facts.

(the maximum hours provision), is "to spread employment by placing financial pressure on the employer through the overtime requirement." *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40; see also *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 576-578; *Roland Company* v. *Walling*, 326 U.S. 657, 669-670. To accomplish this purpose, the standards in Section 7 (and in the minimum wage provisions) are to be applied uniformly so that no employer gains an unfair advantage over his competitor. See *Brooklyn Bank* v. *O'Neil*, *supra*, 324 U.S. at 710. If, however, compliance with these standards can be submitted to binding arbitration, uniformity will not be possible and the public policy of the Act will be seriously impaired.[8]

In recognition of this public policy and of the need for uniformity in the Act's enforcement, the courts have consistently ruled that rights under the Act cannot be waived or diminished by private contract or by collective bargaining agreement. See *Brooklyn Savings Bank* v. *O'Neil*, *supra*, where this Court reversed the denial of liquidated damages in two suits where the employees had accepted the payment of back wages and signed statements waiving their right to liquidated damages; and *Coleman* v. *Jiffy June Farms*, *supra*, where the Fifth Circuit affirmed the award of unpaid overtime compensation in a case where the union had induced the employer to discontinue any overtime payments in exchange for other employee benefits. See also *D. A. Schultz, Inc.* v. *Gangi*, 328 U.S. 108;

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[8] It should be noted in this connection that under both Title VII and the Fair Labor Standards Act, the courts, and not any administrative agency, have "the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." See *Gardner-Denver*, 415 U.S. at 44, 56; and *Kirschbaum* v. *Walling*, 316 U.S. 517, 523.

Mitchell v. *Turner*, 286 F.2d 104, 106 (C.A. 5); *Handler* v. *Thrasher*, 191 F.2d 120, 123 (C.A. 10); *Caserta* v. *Home Lines Agency, Inc.*, 273 F.2d 943, 946 (C.A. 2).

2. Equally untenable as a basis for distinguishing this case from *Gardner-Denver* is the lower court's view that the Portal-to-Portal Act of 1947 expressed a Congressional preference for resolving wage and hour matters through the arbitral process. On the contrary, Congress, after considering the impact of the Fair Labor Standards Act on "voluntary collective bargaining" and the settlement of "industrial disputes" (Portal-to-Portal Act, Section 1(a), 29 U.S.C. 251), carved out only a very limited area in which collective bargaining could supplement the wage and hour provisions of the Fair Labor Standards Act.[9]

Under this Act, time spent traveling to and from the place of principal activity, and time spent in activities preliminary or postliminary to the principal activity, are not working time for purposes of Section 7 unless the contract so provides (29 U.S.C. 254). Section 3(o) (29 U.S.C. 203(o)), added by the Fair Labor Standards Amendments of 1949 (63 Stat. 910), defines "hours worked" to exclude "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured

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[9] During the 1938 debates on the Fair Labor Standards Act, Congress rejected an early House bill that would have prohibited the establishment of minimum wage and maximum hours for employees in occupations or industries where a "substantial portion of the employees" were covered by "collective bargaining agreements" and the "facilities for collective bargaining" were adequate to accomplish the purposes of the Act (H.Rept. 1452, 75th Cong., 1st Sess., p. 15; H.Rept. 2182, 75th Cong., 3d Sess., pp. 6-7).

working time during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement." And Sections 7(b), (j) and (k) (29 U.S.C. 207(b), (j) and (k)) provide limited overtime exceptions for certain contractual agreements which compute overtime on the basis of some period longer than one week.

The very specificity with which these exceptions are spelled out precludes any suggestion that the minimum wage and maximum hour provisions of the Fair Labor Standards Act can be modified by the collective bargaining or arbitral process.

3. The decision below incorrectly assumes that "harmony between a union and an individual" can be presumed where claims are made under the Fair Labor Standards Act. As the *Jiffy June* case illustrates, however, a union may be willing to compromise a claim under the Fair Labor Standards Act as the quid pro quo for a concession by the employer on some other matter. And even if the union vigorously supports the employee's claim, arbitrators, whose "specialized competence pertains primarily to the law of the shop" (*Gardner-Denver, supra,* 415 U.S. at 57), are not usually familiar with the large body of decisional law under the Fair Labor Standards Act. Thus, in this case, the arbitrator based his decision that the employees were entitled to additional compensation on "the doctrine of custom and past practice" (R. 67). He did not purport to apply the Fair Labor Standards Act and, as the court below recognized, the arbitrator's decision that compensation for weekly hours over 40 should be at straight time, rather than at premium rates, was squarely contrary to the requirements of the FLSA (App. 3a).

4. The court below, in limiting *Gardner-Denver* to Title VII cases, simply ignores this Court's earlier decisions, holding, in similar contexts, that employees are entitled to direct access to the courts in order to enforce their statutory rights. Thus, in *U.S. Bulk Carriers* v. *Arguelles,* 400 U.S. 351, the Court held that seamen were entitled to sue in federal court for unpaid wages and the statutory penalty without having to exhaust grievance procedures. As Mr. Justice Harlan explained in a concurring opinion, the Court's preference for arbitration applies only to "substantive rights [which] derive solely from the contract" (400 U.S. at 361). When, however, the employees assert rights derived from a federal statute "the presumption of comprehensiveness of the arbitral remedy is * * * rebutted." 400 U.S. at 362.

See also *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 268 (holding that a returning serviceman "was not obliged * * * to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement" before bringing an action in court under Section 9(d) of the Universal Military Training and Service Act, and that this was so even though a determination of the statutory rights asserted by the serviceman "may necessarily involve interpretation of a collective bargaining agreement"); *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432 (reversing a holding that a provision for binding arbitration foreclosed the Board from enforcing the statutory requirement that the company bargain in good faith); *National Labor Relations Board* v. *Marine Workers,* 391 U.S. 418 (holding that an expelled union member could file an unfair labor practice charge with the Board without

having first exhausted his intra-union procedures); and *Thompson* v. *Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (S.Ct. Iowa), certiorari dismissed as improvidently granted, 405 U.S. 228 (holding that employees who had not pursued their contract grievance procedures could nonetheless bring suit under Section 16(b) of the Fair Labor Standards Act to recover unpaid wages due under the maximum hours provisions).[10]

Although the precise issue raised in these cases was whether employees were required by virtue of an applicable collective bargaining agreement to attempt arbitration before pursuing a statutory right (see, *e.g., Iowa Beef, supra,* 185 N.W.2d 738), the Court's holdings clearly indicate its view that employees must be permitted to assert their statutory rights in court, particularly where, as here, those rights are in no way dependent upon or derived from a collective bargaining agreement. As this Court said in *Gardner-Denver, supra,* 415 U.S. at 51-52, "[t]he actual submission of petitioner's grievance to arbitration in the present case does not alter the situation * * * [since] mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."

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[10] This Court granted certiorari (404 U.S. 820) and heard argument on the merits, but then dismissed certiorari as improvidently granted (405 U.S. 228). According to the Court, "the issues as presented by petitioner [employer] provide no occasion to address * * * the question whether, although the statutory claim is not subject to contract arbitration, pursuit of the statutory remedy is nevertheless barred because respondents might have made [their claim] the basis of a grievance for alleged violation of * * * the collective bargaining agreement." 405 U.S. at 230.

CONCLUSION

Because of the decision's clear conflict with *Alexander* v. *Gardner-Denver*, 415 U.S. 36, and because of the evident importance of the question, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 73-1166

RICHARD R. SATTERWHITE, JR., ET AL.,
Appellants

v.

UNITED PARCEL SERVICE, INC., *Appellee*

(D. C. Civil Action No. C-3070)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO

Decided May 3, 1974

efore BREITENSTEIN, BARNES and BARRETT, *Circuit Judges.*

BREITENSTEIN, Circuit Judge:—The issue here is ıether an employee's right to sue under § 16(b) of the ir Labor Standards Act, 29 U.S.C. § 216(b), for overtime mpensation claimed under § 7(a)(1), 29 U.S.C. § 207(a)) is foreclosed by prior submission of his claim to final bitration under the grievance procedure of a collective-rgaining agreement. The trial court granted judgment the employer. We affirm.

The facts are not in dispute. Plaintiff-appellant Satter-ite sued for himself and others similarly situated. fty-eight other employees of defendant-appellee have d their written consents to become parties plaintiff in

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Senior Judge, United States Court of Appeals, Ninth rcuit, sitting by designation.

accordance with § 16(b). Plaintiffs are members of Delivery Drivers, Warehousemen and Helpers, Local Union No. 435, which has a collective-bargaining agreement with the employer. The period involved is December 29, 1970, to September 15, 1971, the date of expiration of the pertinent labor contract. The cause of the controversy was the elimination by employer of two 15-minute coffee breaks for which there had previously been no deduction in pay. Employer claimed the right to eliminate the coffee breaks because the labor contract did not cover that subject.

The labor contract has a three-step grievance procedure culminating in compulsory arbitration. A grievance is defined as "a dispute, misunderstanding, or controversy involving the interpretation, construction, intent, or meaning of this Agreement" with exceptions which are not pertinent. The arbitration award is binding and conclusive unless beyond the jurisdiction fixed by the contract. No claim is made here that the award exceeded the jurisdictional grant.

The labor contract provides for compensation at 1 and ½ times the straight hourly rate for time worked in excess of 40 hours per week or 8 hours per day, each exclusive of lunch periods. The employees filed a grievance claiming pay for the extra ½ hour a day of work, or 2 and ½ hours per week, resulting from the elimination of the two 15-minute coffee breaks. The matter was not settled in the first two grievance steps and the union demanded arbitration.

The company asserted that the controversy was not arbitrable because the labor contract did not cover coffee breaks. The union then sued in the United States District Court for the District of Colorado for specific performance of the arbitration clause. The court gave summary judgment to the union and ordered the company to arbitrate.

The controversy was then submitted to an arbitrator who, in a comprehensive written opinion, held that the company could not unilaterally eliminate the paid coffee breaks and that the employees were entitled to ½ hour pay for each day worked during the pertinent period. The union and the company then executed and presented to the arbitrator a written joint request for a supplemental decision on whether the award should be paid at straight time or at time and ½. The arbitrator, in a carefully considered written opinion, held that payment should be at straight time. It is reasonable to infer that the arbitrator compromised by giving the employees all the time which they sought while deciding the rate of pay in favor of the company. The award was paid and the employees have received what was due to them thereunder.

This suit was then brought under FLSA § 16(b) to recover time and ½ for work in excess of 40 hours per week. FLSA § 7(a)(1) provides for pay at 1 and ½ times the straight rate for work in excess of 40 hours per week. This differs from the arbitration award which gave the employees a straight rate extra ½ hour pay for each day worked. The company pleaded the arbitration award as a defense.

On the authority of Alexander v. Gardner-Denver Company, 10 Cir., 466 F.2d 1209, the district court held that the arbitration award was final and dispositive. Judgment was entered dismissing the action. During the pendency of the instant appeal, the Supreme Court reversed Gardner-Denver. 94 S.Ct. 1011.

In Gardner-Denver an employee's claim of racial discrimination had been submitted to arbitration in accordance with a collective-bargaining agreement. Prior to the arbitration hearing the employee filed a charge of racial discrimination with the Colorado Civil Rights Commission which referred the complaint to the federal Equal

Employment Opportunity Commission. The arbitrator ruled that the employee had been discharged for just cause and made no reference to the discrimination claim. Thereafter EEOC determined that there was not reasonable cause to believe that a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., had occurred. The employee then filed suit in federal court asserting a violation of the Act. See 42 U.S.C. § 2000e-2(a)(1).

In Gardner-Denver the Supreme Court was concerned with Title VII of the Civil Rights Act. We are concerned with the Fair Labor Standards Act. The employees here read Gardner-Denver as holding that the arbitration of a contract right is no defense to judicial determination of a statutory right and, hence, they may maintain and secure their statutory right by federal court suit. Gardner-Denver dealt with racial discrimination. The dispute here is over the rate of pay for overtime.

Gardner-Denver recognizes the federal policy favoring arbitration of labor disputes and reviews the pertinent decisions. See 94 S.Ct. at 1018 and particularly n. 6, 7. The Court summarized its decision thus, Ibid.:

"For the reasons stated in Parts III, IV, and V of this opinion, we hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII."

Our problem is whether such an award is dispositive of a statutory claim under FLSA.

Gardner-Denver says that the legislative history of Title VII manifests a congressional intent to allow an individual to pursue rights under both Title VII and other applicable state and federal statutes. Accordingly, Title VII supplements rather than supplants existing laws and institutions relating to employment discrimination. 94 S.Ct. at 1019-

1020. The doctrine of election of remedies is held inapplicable in a situation involving statutory rights distinctly separable from contract rights even though the violation of both rights may have resulted from the same factual occurrence. Ibid. at 1020-1021. Resort to arbitration does not waive the Title VII cause of action because the statutory rights conferred cannot be prospectively waived and they form no part of the collective-bargaining process. Ibid. at 1021-1022. The Court comments that an arbitrator's authority is confined to the resolution of questions of contractual rights, regardless of whether they resemble or duplicate Title VII rights. Ibid. at 1022. The Court rejects the argument that to permit an employee to have recourse to both arbitral and judicial forums is unfair to the employer, stating that by a Title VII action an employee is asserting a statutory right independent of the arbitration process and such right simply is not given by statute to the employer. Ibid. at 1022-1023. The Court also says that a policy of deferral by federal courts to arbitral decisions would not comport with the congressional objective that federal courts should exercise the final responsibility for enforcement of Title VII. Ibid. at 1023-1025.

The acceptance of the Court's analysis and reasoning in Gardner-Denver does not solve our problem unless we equate the wages and hours provisions of FLSA with the anti-discrimination provisions of Title VII. Strong national policy is expressed both in Title VII, 94 S.Ct. at 1019, and in FLSA, see 29 U.S.C. § 202, and Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706-707, 5 WH Cases 232. These policies, each in its turn, should be balanced against the federal policy favoring arbitration of labor disputes.

In a number of respects FLSA is importantly different from Title VII. Gardner-Denver refers to the significant role of private individuals in the enforcement of Title VII

rights. 94 S.Ct. at 1018. In Employees etc. v. Department of Public Health and Welfare of Missouri, 411 U.S. 279, 286, 20 WH Cases 1254, 1256, the Court said that, "* * * private enforcement of the [FLSA] was not a paramount objective * * *." The independent statutory remedies in Title VII evince an intent to accord parallel or overlapping relief apart from contractual processes. The absence of such procedures in FLSA suggests a greater reliance on contract remedies and a lesser emphasis on individual enforcement.

Additionally, the Portal-to-Portal Act of 1947 29 U.S.C. § 251 et seq., resulted from congressional dissatisfaction with judicial interpretation of FLSA. See 29 U.S.C. § 251(a). It established the defense of good faith reliance on administrative regulations, 29 U.S.C § 259(a), and declared the congressional policy "to protect the right of collective bargaining and * * * limit the jurisdiction of the courts." 29 U.S.C. § 251(b). The unavailability of the good faith defense in the case at bar is not pertinent. The point is that in certain circumstances good faith is a defense to an FLSA action. The defense, however, is not available in Title VII actions. See Griggs v. Duke Power Co., 401 U.S. 424, 432, 3 FEP Cases 175 and Jones v. Lee Way Motor Freight, Inc., 10 Cir. 431 F.2d 245, 250, 2 FEP Cases 895, cert. denied 401 U.S. 954, 3 FEP Cases 193. The Portal-to-Portal Act speaks to the protection of collective bargaining. Gardner-Denver says that, 94 S.Ct. at 1019, "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements." The different approach to the defense of good faith and the different emphasis on collective bargaining indicates that Congress intended that wage disputes and racial disputes should not receive the same treatment.

Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective

rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. Gardner-Denver says, 94 S.Ct. at 1024, that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," and that "judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." We are concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations. The added fear expressed in Gardner-Denver that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," 94 S.Ct. at 1024 n. 19, has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members. Significantly, 58 other employees have joined as plaintiffs.

In Gardner-Denver the Court reasserted the federal policy favoring arbitration of labor disputes. 94 S.Ct. at 1018-1019 and particularly n. 6. This policy was offset against that established by the Civil Rights Act of 1964. Citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, the Court said that in the Civil Rights Act "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" The conclusion that the anti-discrimination policy rated higher than that favoring arbitration of labor disputes was determinative. We find nothing in any pertinent legislative history or court decision to indicate that Congress, by the grant of a right to private suit under FLSA § 16(b), intended to establish a policy preference for the determination of a wage dispute in judicial rather than arbitral proceedings. Indeed, the only policy expression of which we are aware, that contained in the Portal-to-Portal Act, 29 U.S.C. § 251(b), is to the contrary.

Industrial peace is important not only to employees and employers but also to the public. The delineation of the respective rights of employees and employers in collective-bargaining contracts has helped to secure industrial peace. Many of those contracts contain provisions which define as contract rights the same rights as are granted by federal statutes. Indeed, the wage provisions of FLSA may not be waived by agreement. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707, 5 WH Cases 232. In many contracts the unions have foregone the right to strike and management has accepted compulsory arbitration. See Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 247-248, 74 LRRM 2257. The ever-present disputes over wages and hours are readily adaptable to arbitration. Resort to judicial process after arbitration prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided, on the same factual background.

We hold that when a wage dispute is submitted to arbitration in accordance with a collective-bargaining greement, the employees may not thereafter maintain an FLSA § 16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator. We are convinced that the policy of Congress, recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective-bargaining agreement. The high priority which Congress has given to protection against racial discrimination has no application to a dispute over rate of pay. The reassertion in a judicial forum of the same wage claim determined in an appropriate arbitration hinders rather than promotes industrial peace, and should not be permitted.

Affirmed. Each party shall bear his own costs.

APPENDIX B

MARCH TERM—MAY 3, 1974

Before THE HONORABLE JEAN S. BREITENSTEIN, THE HONORABLE STANLEY N. BARNES,* and THE HONORABLE JAMES E. BARRETT, *Circuit Judges.*

No. 73-1166

RICHARD R. SATTERWHITE, JR., for himself and in behalf of all other persons similarly situated, *Plaintiff-Appellant,*

v.

UNITED PARCEL SERVICE, INC., an Ohio Corporation, *Defendant-Appellee.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is AFFIRMED. Each Party Shall Bear His Own Costs.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

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* Of The Ninth Circuit, Sitting by Designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3070

RICHARD R. SATTERWHITE, JR., for himself and in behalf of all other persons similarly situated, *Plaintiffs*

v.

UNITED PARCEL SERVICE, INC., an Ohio Corporation, *Defendant*

MEMORANDUM OPINION

WINNER, Judge

This case has been submitted on an agreed factual record. The present action was preceded by Delivery Drivers, Warehousemen and Helpers, Local Union No. 435 v. United Parcel Service, Inc., Civil Action No. C-3070 in this Court. The complaint in that case charged that United Parcel:

". . . reduced the compensation of its employees by the device of charging against their wages the time spent during their daily rest periods or 'coffee breaks,' contrary to the long established practice and custom, and by such action the defendant has deprived its employees of the compensation to which they are entitled by virtue of the said contract."

That complaint additionally pleaded an arbitration agreement, and the union asked that defendant be ordered to arbitrate the dispute. Cross motions for summary judgment were filed, and on September 17, 1971, Judge Chilson granted the Union's motion for summary judgment and ordered United to arbitrate. An arbitration was held be-

fore Prof. George E. Bardwell, and in the arbitration proceeding the parties stipulated that one issue to be decided by him was, "If the decision of the Arbitrator is in favor of the Union, to what relief, if any, are the employees entitled."

Following a hearing, the arbitrator handed down a 28-page award on February 18, 1972. He quoted the stipulated issues, and he quoted from the overtime provisions of the labor contract. He discussed the evidence, the contentions of the parties and the briefs, and his award was:

"All employees in the bargaining unit as of the date of this award are entitled to one-half hour pay for each day worked from December 29, 1970 through September 15, 1971."

Thereafter, counsel for the parties filed a "Joint request for Supplemental Decision." It asked that the arbitrator decide, inter alia, the question:

"(a) Is the back pay award in the Arbitrator's decision of one-half (½) hour's pay for the days actually worked to be paid at straight time or at time and one-half (1½)?"

Once more, briefs were filed, and a hearing was held which was followed by a 14-page supplemental award in which it was held:

"Each employee eligible to receive pay under this award is entitled to one-half (½) hour's pay at straight time rates for each day worked from December 29, 1970 through September 15, 1971."

Being dissatisfied with the supplemental award, plaintiffs [whose rights were decided by the arbitrator in Civil Action No. C-3070] filed this case, and they argue that the arbitrator had no right or power to decide plaintiffs' en-

titlement to overtime pay, and that under the Fair Labor Standards Act, only a court of competent jurisdiction can decide this question.

It is true that the arbitration had to do with interpretation of the contract in question, but, nevertheless, present plaintiffs expressly requested the arbitrator to decide the exact question they now want to litigate again in this court. Plaintiffs say that the claims are different because one claim is for contract interpretation while the other is for statutory interpretation. An examination of the contract shows that its provisions are but a paraphrase of the Fair Labor Standards Act on the requirement for overtime. Under plaintiffs' position, they could ask for an award from the arbitrator which would be binding on the employer, but, say plaintiffs, it was a heads I win, tails you lose situation. They say that they can secretly conceal part of their case to insure a second chance if they lose. We disagree. The issue submitted to the arbitrator was not limited by its terms to contract interpretation. It asked the direct question of the arbitrator as to whether the employees were entitled to straight time or time and one-half. He answered that they were entitled to straight time only. Plaintiffs say that he was wrong as a matter of law, but errors in law on the part of an arbitrator was not grounds for voiding the award. In Western Oil Fields v. Rathbun (1957) 10 Cir. 250 F.2d 69, it was said:

"Arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside because of a mistake of the *arbitrator* in either."

See, also, Raytheon Co. v. Rheem Mfg. Co. (1963) 9 Cir. 322 F.2d 173, Trailways of New England, Inc. v. Amalgamated Association etc, AFL-CIO Division (1965) 1 Cir. 353 F.2d 180, Marcy Lee Mfg. Co. v. Cortley Fabrics (1965) 2 Cir. 354 F.2d 42.

As was said in Trailways of New England, supra, "Arbitrators, however, even as courts . . . have 'jurisdiction' to decide erroneously."

In Alexander v. Gardner-Denver (1971) D.C. Colo. 346 F. Supp. 1012, aff'd (1972) 466 F.2d 1209, this Court discussed its thinking concerning the finality of arbitration awards. Much of what is there said is here applicable and it need not be repeated, although that discussion and the cases there quoted and cited are adopted by reference. One question there decided by the arbitrator had to do with an alleged violation of Alexander's civil rights—a matter over which federal district courts are given jurisdiction. This Court held that the decision of the arbitrator was final. The Tenth Circuit affirmed. We believe this to be the law in this Circuit.

Here, the union was the party which sought the aid of this Court in forcing arbitration. It participated in the arbitration and it joined in a request that the arbitrator decide whether the employees should receive straight time pay or time and one-half. Whether the arbitrator was right or whether he was wrong is not the question before us. The question is, "Did the arbitrator have jurisdiction to decide either rightly or wrongly?" He did.

It Is Ordered that judgment enter in favor of defendant and against the plaintiffs.

Dated at Denver, Colorado, this 22nd day of January, 1972.

Fred M. Winner
United States District Judge

Filed January 24, 1973.

JUDGMENT

Pursuant to and in accordance with the Mem
Opinion filed January 24, 1973, signed by The H
Fred M. Winner; it is

ORDERED that the action and complaint herein
hereby is dismissed, and that the Defendant shall
costs upon the filing of a bill of costs with the C
this Court.

DATED at Denver, Colorado, this 30th day of
1973.

FOR THE COURT:

James R. Manspeaker, *Clerk*
United States District Court

Filed January 30, 1973.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-332.

RICHARD R. SATTERWHITE, JR., for Himself and on Behalf of All Other Persons Similarly Situated,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

Was not the court of appeals correct in holding that when a wage dispute has been submitted to union-demanded binding arbitration in accordance with a collective bargaining agreement, and, pursuant to the arbitrator's award, back pay has been paid by the employer and accepted by the employees, the employees may not thereafter maintain a Fair Labor Standards Act § 16(b) suit to recover additional back pay arising from the same factual occurrence as that presented to the arbitrator?

STATEMENT.

Petitioner seeks certiorari to have this Court review the decision of the United States Court of Appeals for the Tenth Circuit affirming the order of the United States District Court for the District of Colorado which granted judgment for the employer, respondent United Parcel Service, on a claim under Section 16(b) of the Fair Labor Standards Act of 1938 ("Wage and Hour Law" or "FLSA"), 52 Stat. 1060, 29 U. S. C. §§ 201-19, to recover overtime compensation allegedly due under Section 7(a)(1) of that Act. The action was brought by petitioner Satterwhite, an employee of respondent, on behalf of himself and 58 other employees who filed consents to become parties plaintiff pursuant to Section 16(b) of the Wage-Hour Law (R. 22a-24a).[1]

Petitioner's complaint was dismissed by the district court on January 30, 1973, pursuant to respondent's motion for summary judgment (R. 24a-26a), on the ground that the suit was foreclosed by prior submission by joint request of the parties of the same claim to final and binding arbitration under the grievance procedure of a collective bargaining agreement (App. 10a-14a; R. 108a-111a). The court of appeals affirmed, holding that "when a wage dispute is submitted to arbitration in accordance with a collective bargaining agreement, the employees may not thereafter maintain an FLSA § 16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator." (App. 8a).

This case arises out of a dispute between an employer and a union over the rearrangement of employees' daily work schedule. Petitioner and his class are members of the Delivery Drivers, Warehousemen and Helpers Local Union

1. "R" references are to the Joint Appendix in the court of appeals; "App." to the appendices to the Petition for Certiorari.

No. 435 which at all relevant times herein had a valid collective bargaining agreement with respondent (App. 2a). Before December 29, 1970, employees reported to work at 8:00 a.m., received a thirty-minute unpaid lunch break and worked until 4:30 p.m., for which services they were paid eight hours pay per day or forty hours per week. They were permitted two paid fifteen minute coffee breaks (R. 35a).

After December 29, 1970, respondent restructured the work day by increasing the unpaid lunch break to one hour, eliminating the two coffee breaks and making the hours 8:00 a.m. to 5:00 p.m. Employees who were truck drivers did not have a scheduled lunch period, but rather one hour of unpaid "personal time" which they could take in one or more segments at each employee's discretion as circumstances permitted. The employees continued to be paid eight hours pay per day or forty hours per week (R. 35a). Thus, the crux of the dispute was the change from a practice under which employees received eight hours pay but actually worked 7½ hours to one under which the same employees were required to spend the full eight paid hours working.

After this change, several employees, including petitioner (R. 43a), filed grievances against respondent, alleging that the elimination of the coffee break as paid time was a violation of the labor agreement which was in effect throughout the period in question (R. 39a-43a). Respondent's action to reschedule the work day to provide for a full eight hours of work during the day and to increase the unpaid lunch time was based on the fact that the contract was silent on the subject of coffee breaks and contained an "entire agreement" clause which provided that the union "agrees that this Agreement is intended to cover all matters affecting wages, hours and other terms and all conditions of

employment" (R. 99a) and a limited arbitration clause (R. 95a-97a). Therefore, respondent took the position that the elimination of paid coffee breaks was not a proper subject for grievance or arbitration because the right to coffee breaks was not set forth in the contract.

The union then filed suit in the United States District Court for the District of Colorado to compel arbitration of the matter, alleging that it had pursued to exhaustion the grievance filed by petitioner and his fellow employees and that respondent had refused to arbitrate the dispute (R. 27a-28a). The parties filed cross motions for summary judgments (R. 30a-33a), and the district court per the Honorable Olin Hatfield Chilson ordered respondent to arbitrate the issue in September, 1971 (R. 34a); **Delivery Drivers, Warehousemen and Helpers, Local Union No. 435 v. United Parcel Service, Inc.**, No. 3070, in the United States District Court for the District of Colorado.

Pursuant to the order, arbitration was held before Professor George E. Bardwell on November 23, 1971, at which petitioner Satterwhite and five of the other plaintiffs in the district court appeared as witnesses for the union (R. 45a). The parties stipulated to the arbitrator the issues involved in the dispute. Among these were: (1) "If the Union did not acquiesce in the Company's action [modifying the work schedule], did the Company have the right to take such action?" and (2) "If the decision of the Arbitrator is in favor of the union, to what relief, if any, are the employees entitled?" (R. 45a-46a). The arbitrator issued a comprehensive 28-page written opinion which held that respondent could not *unilaterally* eliminate the paid coffee breaks, and ruled that the employees were entitled to back pay equal to one-half hour pay for each day worked during the pertinent period from December 29, 1970, when the schedule change took effect, to September 15, 1971, the date of expiration of the labor contract (R. 45a-68a).

Because the labor contract between the union and respondent provided for compensation at one and one-half times the straight hourly rate for *work* in excess of forty hours per week or eight hours per day, each exclusive of lunch periods (R. 89a), the union contended that the back pay awarded should be computed on a time and one-half basis rather than as straight time. To resolve this second dispute the parties agreed to submit to the arbitrator a written joint request for a supplemental decision on whether the award should be paid at straight time or at time and one-half (R. 69a-70a). Briefs were again filed and a hearing was held. In a second, carefully considered 14-page written opinion (R. 70a-81a), the arbitrator ruled that "[E]ach employee eligible to receive pay under this award is entitled to one-half hour's pay at straight time rates for each day worked from December 29, 1970 through September 15, 1971" (R 76a).

Respondent then paid the award and the eligible employees, including petitioner and the other named plaintiffs in the class action, received the back pay (App. 3a). However, having failed to achieve all of the desired award from the arbitrator, petitioner Satterwhite and the other named members of the class then turned to federal district court and began the instant lawsuit, with the results set forth above.

ARGUMENT.

I. Introduction.

Petitioner would have this Court believe that the decision of the court of appeals raises questions of paramount importance involving the denial of employees' Fair Labor Standards Act rights and directly contradicts the Court's decision in **Alexander v. Gardner-Denver Co.**, 415 U. S. 36 (1974). This is not so. Despite petitioner's attempt to posture this case as an infringement on employees' statutorily guaranteed right to time and one-half for overtime in excess of forty hours,[2] it is merely a standard labor-management dispute over the method in which employees' work schedules were rearranged. What is not standard is the attempt of petitioner and other employees on whose behalf the union had successfully prosecuted grievances through arbitration to invoke the FLSA to supplement an arbitrator's generous back pay award. And petitioner and his class seek to avoid the policy favoring finality of arbitration awards by equating this essentially collective demand for more money with an individual employee's right to protection from discrimination under Title VII of the Civil Rights Act of 1964.

The union objected—through grievances of petitioner and others—to respondent's unilateral changes in employees' working hours and went to court to force arbitration of the dispute. The union succeeded in compelling arbitration and thereafter obtained a favorable decision and a generous back pay award for employees in the bargaining unit. However, the union wanted still more and returned to the arbitrator with the request, inter alia, that back pay be computed at time and one-half rather than straight time. The union lost on that issue—not surprisingly, since the

2. Fair Labor Standards Act, Section 7(a)(1), 29 U. S. C. § 207(a)(1).

actual work day never exceeded eight hours—and now, through the device of an employee's Section 16(b) suit under the FLSA brought by an original grievant asks the federal courts to increase the arbitrator's award.

Both courts below properly refused to tamper with the arbitrator's award on the pretext of an alleged wage and hour law violation, and their decisions fully comport with the strong federal policy favoring final and binding arbitration of labor disputes. The court of appeals carefully considered and properly distinguished this Court's decision in **Alexander v. Gardner-Denver Co.**, 415 U. S. 36 (1974).

Moreover, petitioner's basic contention that he and his class should be entitled to "another bite at the apple" whenever an arbitrator's award arguably conflicts with or could be supplemented by a federal statute would enmesh the federal judiciary in review of large numbers of arbitration awards ordered by skilled arbitrators within the areas of their expertise. This disrespect for the finality of arbitrators' awards (except in the unique area of discrimination in violation of Title VII where the Congress plainly recognized the danger that unions would not protect individual members from discriminatory actions of employers—or, indeed, of the unions themselves) would, under any circumstances, violate the basic principles favoring labor arbitration set down by this Court. This is even clearer here, where (1) petitioner's union had demanded arbitration of the grievance filed by petitioner and his fellow grievants to the extent of obtaining a court order to compel it, (2) the very issue of whether back pay for petitioner and his fellow grievants should be at straight time or time and one-half rates had been submitted to the arbitrator by agreement of the union which was prosecuting petitioner's claim and (3) the right of petitioner and his fellow grievants to recover depended upon the willingness of the federal

courts to hold that they must follow so much of the arbitrator's award as held that each employee was entitled to one-half hour back pay for each day worked (under the union interpretation, a finding that the additional half hour was within the working day for FLSA purposes) and might disregard the remainder of the same award which set the rate at which this additional half hour per work day should be paid.

In fact, the arbitrator here, like a jury, weighed the relative merits of the union's claim on behalf of petitioner and his fellow grievants against the defense presented by respondent and determined that petitioner and each of his fellow employees was entitled to damages equal to one-half hours' pay for each day worked after respondent had altered the work schedule. But the fact that the arbitrator determined that each employee was entitled to the damages he thought appropriate is simply not the equivalent of a finding that each employee had worked additional hours beyond the eight-hour day for Fair Labor Standards Act purposes.

II. The Decision of the Court of Appeals Merely Reaffirms the Strong Federal Policy Favoring Arbitration of Labor Disputes and Therefore Is of No Great Significance.

In affirming the district court's dismissal of petitioner's complaint, the court of appeals properly applied the established doctrine of federal labor relations law favoring arbitration of labor disputes, as enunciated by this Court in **Textile Workers Union v. Lincoln Mills**, 353 U. S. 448 (1957) and the **Steelworkers** trilogy.[3] As the Court stated

3. **United Steelworkers of America v. American Manufacturing Co.**, 363 U. S. 564 (1960); **United Steelworkers of America v. Warrior & Gulf Co.**, 363 U. S. 574 (1960); **United Steelworkers of America v. Enterprise Wheel & Car Corp.**, 363 U. S. 593 (1960).

in **Boys Markets, Inc. v. Retail Clerks Union,** 398 U. S. 235, 243 (1970), the **Steelworkers** cases "emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and cautioned the lower courts against usurping the functions of the arbitrator."

Repeatedly, this Court has warned against judicial review of arbitration awards and has advised lower courts to view with suspicion attempts to entangle them in reweighing the merits of a grievance.[4] In addition to this established judicial policy, Congress has also indicated its preference for final adjustment of labor-management disputes through voluntary arbitration: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Section 203(d), Taft-Hartley Act.

Petitioner seeks to avoid the policy favoring arbitration by arguing that he has a statutory right under the Fair Labor Standards Act totally independent of an arbitration award. But no such right to avoid the effect of final and binding arbitration exists in the law. And the facts in this case cogently illustrate the reason why the policy exists. For petitioner would have this Court enforce

4. In **Steelworkers v. Enterprise Corp.,** *supra,* 363 U. S. at 596, the Court stated: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." See also **Truck Drivers Union v. Ries & Co.,** 372 U. S. 517, 519 (1963). In **Steelworkers v. Warrior & Gulf Co.,** *supra,* 363 U. S. at 585, the Court cautioned: ". . . the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

a portion of the arbitrator's award and then, on the basis of that portion, reverse the remainder of the award. Relitigation of issues in this fashion can hardly be a source of industrial peace.

A. Neither This Court's Decision in Alexander v. Gardner-Denver Co. Nor the Language or Purposes of the Fair Labor Standards Act Require an Exception to the Policy Favoring Arbitration.

In an attempt to circumvent the strong policy against judicial review of the merits of an arbitration award, petitioner seeks to enter the courthouse through the back door, by alleging he is entitled to a larger remedy under the FLSA than was awarded by the arbitrator. He argues that the arbitrator's award directly contradicts the Fair Labor Standards Act; but the real basis of his claim is that suit under the Act might offer the possibility of a "better deal."

This is not the first time a petitioner has sought review in this Court by contending that federal policy favoring final and binding arbitration conflicts with another federal statute. This Court, however, has repeatedly resolved potential statutory conflicts in favor of strengthening the arbitration process. In **Boys Market v. Retail Clerks Union**, *supra*, for example, the Court concluded that the policy favoring arbitration is so important that the literal terms of Section 4 of the Norris-LaGuardia Act must be accommodated to it. Most recently, in **Gateway Coal Co. v. United Mine Workers**, 414 U. S. 368 (1974), the Court extended the "presumption of arbitrability" to safety disputes, despite arguments that federal safety legislation removed such disputes from the arbitration arena.

Petitioner argues, however, that **Alexander v. Gardner-Denver Co.**, 415 U. S. 36 (1974), creates an exception to the basic policy favoring arbitration of disputes and that that

exception applies in the present case. In fact, this Court's decision in **Gardner-Denver** recognized the federal policy favoring binding arbitration of labor disputes but carved out a narrow exception to the general rule when individual employees sought to assert statutory rights under Title VII of the Civil Rights Act of 1964. Petitioners now seek to expand that narrow exception to cover private suits over wage disputes under FLSA § 16(b).

The decision in **Gardner-Denver** specifically limited the exception to Title VII rights and clearly enunciated the reasons for viewing Title VII rights differently from other contractual or collective bargaining rights. Similarly, the court of appeals carefully compared the legislative history and policies behind Title VII as set forth by this Court with those of the Fair Labor Standards Act, and detailed the ways individual statutory rights sought to be asserted in **Gardner-Denver** are separate and distinct from the rights arising out of a wage dispute.

The whole tenor of this case is different from **Gardner-Denver**. There, an individual employee pursued an individual grievance, and the Court recognized that a harmony of interest between union and grievant cannot always be presumed in discrimination cases. However, here the issue is not individual but collective—the union sought at arbitration and seeks now through this suit as much money as it can possibly attain for all members of the bargaining unit. The union's interest is inseparable from the interests of employees in the bargaining unit.

In **Gardner-Denver** the Court emphasized the significant role private individuals play in the enforcement of Title VII rights. By contrast, as the court of appeals properly pointed out, this Court has said, "private enforcement of the FLSA was not a paramount objective."[5] In **Gardner-**

5. **Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health & Welfare,** 411 U. S. 279, 286 (1973).

Denver, the Court referred to the Congressional intention that the policy against discrimination be of "the highest priority."[6] Here, the court of appeals reviewed the legislative history of the FLSA and found no congressional policy preference for the determination of wage disputes in judicial rather than arbitral proceedings (App. 8a):

> We are convinced that the policy of Congress recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective bargaining agreement. The high priority which Congress has given to protection against racial discrimination has no application to a dispute over rate of pay.

In **Gardner-Denver** the Court found a legislative intent in Title VII to provide non-exclusive access to various forums—state human relations commissions, EEOC and the courts, for example. By contrast, arbitration has always been favored in true labor cases and the Portal to Portal Act of 1947, 29 U. S. C. § 251(b), is an example of Congressional policy to limit the jurisdiction of the courts in Fair Labor Standards Act cases.

In **Gardner-Denver**, the contract provisions which the arbitrator construed were in no sense the equivalent of the protections contained in Title VII. Here the agreement provides for overtime pay as fully as does the Fair Labor Standards Act. And in **Gardner-Denver** the rights which the plaintiff sought to enforce required both extensive fact finding and the existence of a fact-finder sympathetic to civil rights, reasons that have frequently caused the Congress to grant access to the federal courts. In this case, the right to overtime pay requires neither extensive factual

6. **Alexander v. Gardner-Denver**, 415 U. S. at 47, citing **Newman v. Piggie Park Enterprises, Inc.**, 390 U. S. 400, 402 (1968).

determinations nor a forum more sympathetic than an impartial arbitrator.

In **Gardner-Denver**, the arbitrator made no reference to the grievant's claim of racial discrimination in upholding the discharge. In the instant case, the arbitrator gave explicit consideration to the claim for overtime, rejecting it with full opinion after granting petitioner and his fellow employees an award which was paid by the employer and accepted by the employees. And petitioner has not come to court to seek to have the arbitration award vacated on the grounds the arbitrator exceeded the scope of his authority. Rather, he seeks to retain all of the original arbitration award and supplement it through this action. (Indeed he depends upon that award as the basis for his action to overturn its remedy.)

Under these circumstances, the court of appeals was plainly correct in concluding that neither the direct language of the Fair Labor Standards Act nor the decision of this Court in **Gardner-Denver** provided any basis for a determination that petitioner might relitigate an issue which had already been presented to and decided by the impartial arbitrator.

B. The Award of the Arbitrator Contained No Finding That Petitioner and His Class Had Performed Work Subject to Compensation as Overtime Under the Fair Labor Standards Act.

If petitioner's argument that, as a matter of law, FLSA overtime pay claims cannot be barred by arbitration is a tenuous one, his argument that the arbitrator had resolved the factual issues in his favor is based on even more flimsy assumptions. He has interpreted the arbitrator's back pay award as the equivalent of a finding that each employee actually worked 8½ hours a day or 42½ hours a week. Yet there is nothing in the arbitrator's decision which in-

dicates that he considered half of each lunch hour as working time. The award merely states that employees were to be awarded an amount of money which was to be measured by both the number of days they worked and one-half their hourly rate of pay.

Many varying factual interpretations can be drawn from the lump sum back pay award, and this Court has recognized that "[a]rbitrators have no obligation to the Court to give their reasons for an award." **United Steelworkers of America v. Enterprise Wheel & Car Corp.**, *supra*, 363 U. S. at 598. Would the award have been less subject to collateral attack, for example, if the arbitrator awarded the same amount but characterized the award as two-thirds of the added unpaid lunch period at time and one half? An arbitrator's award is necessarily a whole remedy, the product of many factors weighed and evaluated by him. Yet petitioner has dissected the award and grossly distorted it by accepting part (the number of hours for which back pay was awarded) while seeking to relitigate the rate issue.

Petitioner also claims that the award represented a compromise of coverage under the wage and hour law which is prohibited by **Schulte v. Gangi**, 328 U. S. 108 (1946).[7]

7. In **Schulte v. Gangi** the court was concerned with compromise of controversies over coverage under the Fair Labor Standards Act, not with a factual question as to the number of overtime hours worked. Indeed, the Court specifically declined to rule out the possibility of compromises in such disputes: "Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked. . . ." (328 U. S. at 114, 115). Moreover, although petitioner strongly argues that the arbitrator's award was somehow impermissible as a compromise under the FLSA, courts have upheld compromise settlements of overtime claims. See **Jarrard v. Southeastern Shipbuilding Corporation**, 163 F. 2d 960 (5th Cir. 1947); **Urbino v. Puerto Rico Ry. Light & Power Co.**, 164 F. 2d 12 (1st Cir. 1947); **Keith v. Bersch d.b.a. Lake Shore Platers**, 40 L. C. ¶ 66,621 (N. D. Ill. 1960); **Bracey v. Luray**, 161 F. 2d 128 (4th Cir. 1947).

Again this argument makes the factual assumption that the number of back pay hours awarded by the arbitrator can be separated from the rate applied to those hours. The award was made as a whole, and there is no factual basis for subsequently severing the award of the arbitrator as to hours used as a measure of compensation from the rate of pay for those hours. Neither this Court nor the lower courts can state with any factual certainty what the arbitrator's flexible remedy would have been had the arbitrator determined that a time and one-half rate should be multiplied by the number of hours for which back pay was allowed to arrive at defendant's total liability—or had the arbitrator known that a court might make such a determination.[8]

In this respect, it is important to note that the arbitrator's decision in this case did not base the back pay award on the number of hours worked each day by an employee, but related it only to the total days worked: "For purposes of this award 'day worked' shall mean any day on which the eligible employee reported for work and received compensation for his services." (R. 76a). Thus, it cannot be ascertained whether the back pay awarded bore any relation whatsoever to overtime in the case of individual employees.

Most important, the overtime provisions of the Wage and Hour Law are not violated by a work schedule from 8:00 a.m. to 5:00 p.m. with an unpaid lunch period of one hour, precisely the schedule established by respondent. If for example, the union had agreed, in negotiations, to such a work schedule, there would be no question of an FLSA violation. However, the company lost at the original arbitration because it *unilaterally* changed the work schedule.

8. The existence of this factual doubt as to precisely what the award meant lends further support to the federal policy of not reviewing the merits of arbitration awards.

The arbitrator sustained the union objection to the employer's method of rescheduling employees' workdays and awarded back pay to compensate for this contract violation. Like many back pay awards, the remedy was an attempt to rectify a contract violation, not to compensate employees for time *actually worked*. In this sense, then, the back pay award is a fiction unrelated to actual overtime, for there is no question that the employees only performed work forty hours per week during the relevant period. Respondent did not pay for having forced its employees to work overtime, which it did not do; it paid for its error in unilaterally eliminating the coffee breaks and increasing the lunch period. Only after these damages had been paid did petitioner take the fictional back pay hours awarded by the arbitrator, add them to the forty hours actually worked and thereby assert a wage and hour law overtime violation.

It is undisputed that the arbitrator found that respondent had violated the labor agreement with petitioner's union when it unilaterally eliminated two paid coffee breaks and substituted an equal amount of unpaid lunch time in the work schedule (R. 67a). It is equally clear that the arbitrator had before him the contract provisions which required time and one-half pay for overtime in excess of forty hours per week or eight hours per day (R. 46a). The arbitrator was aware of the fact that the overtime provision made a specific exception for "lunch periods." (*Id.*). From these facts, it is simply impossible for a court to determine that the arbitrator's award allowing back-pay damages to petitioner and his fellow grievants was based on a determination by the arbitrator not merely that respondent had violated the agreement in unilaterally rearranging the work schedule, but that employees under the rearranged schedule had worked an 8½ hour day or a 42½ hour week.

C. Where, as Here, the Union Demanded Arbitration of the Overtime Pay Issue on Petitioner's Behalf, Petitioner Cannot Now Disclaim a Part of Arbitrator's Award and Relitigate the Issue as an FLSA Claim.

The union throughout all stages of the initial court proceedings to compel arbitration, the arbitration itself, and the supplemental arbitration vigorously espoused the position that overtime pay is an arbitrable issue. The court of appeals properly concluded that the strong judicial and congressional policy favoring final resolution of disputes through arbitration would be severely weakened if the union were permitted—through the artifice of a class action brought by one of its members—to disavow a portion of the results of the arbitration it initiated simply because it now seeks more than the arbitrator awarded.

In **Alexander v. Gardner-Denver**, 45 U. S. 36, 49 n. 10 (1974), this Court indicated it was not primarily concerned with the labels applied to various traditional legal and equitable doctrines of estoppel, election of remedies, waiver, or res judicata, in balancing the statutory right of access to the courts under Title VII against the policy favoring binding arbitration. Rather, the Court's concern was with the basic public policies behind Title VII and with fundamental concepts of fairness and due process. Accordingly, rather than pursue a detailed legalistic discussion of these procedural concepts we will concentrate on the basic notion of fairness in the context of this case.

Petitioner contends that the issue here is one of direct access to the courts to enforce statutory rights, citing **U. S. Bulk Carriers, Inc. v. Arguelles**, 400 U. S. 351 (1971), and other cases in support of his position (Petition for Certiorari, p. 13). However, those cases dealt with a very different question, the right of an employee to bypass the

contractual grievance and arbitration procedure and sue *initially* in federal court. The Court's holding in those cases afforded the employee the right to choose which path to follow, either the arbitration or statutory remedy.

Here, petitioner does not seek the right to elect remedies or choose between forums. He chose arbitration and now asks this Court to overturn the decades of decisions favoring final and binding arbitration of labor disputes and to establish a new right applicable only to the employee—the right of successive remedies.

Moreover, petitioner's claim of a right of direct access to the courts is belied by the record. Any claim petitioner has is derived from and based upon the arbitrator's decision.[9] Only after petitioner and his fellow grievants had obtained what he interprets as the favorable arbitrator's decision on the hours for which back pay should be awarded could they seriously maintain this additional claim under the FLSA for overtime rates. They have used the portion of the arbitrator's decision favorable to them as a bootstrap to pull themselves within the purview of the Wage and Hour Law and thereby obtain federal court jurisdiction.[10]

9. Petitioner's contention that his rights under the FLSA "are in no way dependent upon or derived from a collective bargaining agreement" (Petition for Certiorari, p. 14) lacks substance. Certainly, coffee breaks are not granted by law; they are either granted or withheld, and paid or unpaid pursuant to specific terms in the labor agreement, or based upon past pattern and practice in the shop. It is difficult to envision a subject more closely linked to the "law of the shop" and therefore within the specialized competence of arbitrators" than coffee breaks. See **United Steelworkers of America v. Warrior & Gulf Navigation Co.**, *supra*, 363 U. S. at 581, 583.

10. Even if the arbitrator had erred—and it seems clear that he did not err—that fact alone is not enough to require that the courts provide an additional forum in which petitioner and his fellow grievants may relitigate the overtime pay issue. The judicial scope of review of arbitration awards is extremely narrow. Even an error on the part of the arbitrator in his interpretation of the law is not a ground for setting aside an award.

Acceptance of petitioner's arguments would result in the fundamentally unfair and untenable position that compulsory labor arbitration would only bind the employer. If an employee or union has failed to obtain all that was sought at arbitration, he or it could have a "second bite at the apple" merely by recasting the dispute in terms of some federal statute. Increasingly, rights afforded by federal statutes duplicate contractual rights—in wages, hours, occupational health and safety, discrimination, pension, health and welfare. If **Gardner-Denver** applies to this and every case in which a grievant can find a statutory claim to parallel his contractual claim, it has rendered the arbitration clause in labor agreements virtually meaningless, despite the strong federal policy favoring final and binding arbitration of labor disputes.

Petitioner contends he should have the right to hold the federal law claim in reserve and force arbitration of the contractual right. If he had been totally successful at arbitration, he could have pled finality of an arbitration award to any subsequent challenge by respondent. Since, however, he failed to achieve all he asked for, he now claims the right to disregard so much of the arbitrator's award as displeases him and relitigate that part of the case in court.

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10. (Cont'd.)

Office of Supply, Govt. of Republic of South Korea v. New York Navigation Co., 469 F. 2d 377, 379 (2d Cir. 1972); see also **San Martine Compania de Navegazian v. Saquenay Terminal Ltd.**, 293 F. 2d 796, 801 (9th Cir. 1961).

Many courts have enunciated the principle that an arbitration award will not be reviewed on the merits or vacated "even though the arbitrator may have made, in the eyes of judges, errors of fact and law unless . . . [the award] compels the violation of law or conduct contrary to accepted public policy." **Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.**, 442 F. 2d 1234, 1239 (D. C. Cir. 1971); see **Gulf States Telephone Co. v. Local 1692, International Brotherhood of Electrical Workers**, 416 F. 2d 198, 201 (5th Cir. 1969); **Dallas Typographical Union No. 173 v. A. H. Belo Corp.**, 372 F. 2d 577, 581 (5th Cir. 1967).

But the arbitrator's award is a single award which deserves the respect to which labor arbitration awards are entitled.

Respondent's position is contrary to the well established principle favoring arbitration of labor disputes. The decision of the court of appeals so clearly sets forth these long-standing principles rejecting petitioner's novel contention, that it does not merit review by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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